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5 UNITED STATES DISTRICT COURT
6 DISTRICT OF NEVADA
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9 RAUL M. RODRIGUEZ,

10 Plaintiff,

Case No. 2:18-cv-01525-GMN-BNW

11 v.

SCREENING ORDER

12 NEVADA BOARD OF PAROLE, et al.,

13 Defendants.

14 Plaintiff, who is a prisoner in the custody of the Nevada Department of Corrections
15 (“NDOC”), has submitted a civil rights complaint pursuant to 42 U.S.C. § 1983 and has
16 filed an application to proceed *in forma pauperis*.¹ (ECF No. 1, 1-1). The Court now
17 screens Plaintiff’s civil rights complaint pursuant to 28 U.S.C. § 1915A.

18 **I. SCREENING STANDARD**

19 Federal courts must conduct a preliminary screening in any case in which a
20 prisoner seeks redress from a governmental entity or officer or employee of a
21 governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any
22 cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim
23 upon which relief may be granted, or seek monetary relief from a defendant who is
24 immune from such relief. See 28 U.S.C. § 1915A(b)(1),(2). *Pro se* pleadings, however,
25 must be liberally construed. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.
26 1990). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
27 elements: (1) the violation of a right secured by the Constitution or laws of the United

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¹ The Court will dismiss the application to proceed *in forma pauperis* as moot.

1 States, and (2) that the alleged violation was committed by a person acting under color
2 of state law. See *West v. Atkins*, 487 U.S. 42, 48 (1988).

3 In addition to the screening requirements under § 1915A, pursuant to the Prison
4 Litigation Reform Act (PLRA), a federal court must dismiss a prisoner's claim if "the
5 allegation of poverty is untrue" or if the action "is frivolous or malicious, fails to state a
6 claim on which relief may be granted, or seeks monetary relief against a defendant who
7 is immune from such relief." 28 U.S.C. § 1915(e)(2). Dismissal of a complaint for failure
8 to state a claim upon which relief can be granted is provided for in Federal Rule of Civil
9 Procedure 12(b)(6), and the court applies the same standard under § 1915 when
10 reviewing the adequacy of a complaint or an amended complaint. When a court
11 dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend the
12 complaint with directions as to curing its deficiencies, unless it is clear from the face of
13 the complaint that the deficiencies could not be cured by amendment. See *Cato v. United*
14 *States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

15 Review under Rule 12(b)(6) is essentially a ruling on a question of law. See
16 *Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure
17 to state a claim is proper only if it is clear that the plaintiff cannot prove any set of facts in
18 support of the claim that would entitle him or her to relief. See *Morley v. Walker*, 175 F.3d
19 756, 759 (9th Cir. 1999). In making this determination, the court takes as true all
20 allegations of material fact stated in the complaint, and the court construes them in the
21 light most favorable to the plaintiff. See *Warshaw v. Xoma Corp.*, 74 F.3d 955, 957 (9th
22 Cir. 1996). Allegations of a *pro se* complainant are held to less stringent standards than
23 formal pleadings drafted by lawyers. See *Hughes v. Rowe*, 449 U.S. 5, 9 (1980). While
24 the standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff
25 must provide more than mere labels and conclusions. *Bell Atlantic Corp. v. Twombly*,
26 550 U.S. 544, 555 (2007). A formulaic recitation of the elements of a cause of action is
insufficient. *Id.*

27 Additionally, a reviewing court should "begin by identifying pleadings [allegations]
28 that, because they are no more than mere conclusions, are not entitled to the assumption

1 of truth.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). “While legal conclusions can
2 provide the framework of a complaint, they must be supported with factual allegations.”
3 *Id.* “When there are well-pleaded factual allegations, a court should assume their veracity
4 and then determine whether they plausibly give rise to an entitlement to relief.” *Id.*
5 “Determining whether a complaint states a plausible claim for relief . . . [is] a context-
6 specific task that requires the reviewing court to draw on its judicial experience and
7 common sense.” *Id.*

8 Finally, all or part of a complaint filed by a prisoner may therefore be dismissed
9 *sua sponte* if the prisoner’s claims lack an arguable basis either in law or in fact. This
10 includes claims based on legal conclusions that are untenable (e.g., claims against
11 defendants who are immune from suit or claims of infringement of a legal interest which
12 clearly does not exist), as well as claims based on fanciful factual allegations (e.g.,
13 fantastic or delusional scenarios). See *Neitzke v. Williams*, 490 U.S. 319, 327-28 (1989);
14 see also *McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

15 **II. SCREENING OF COMPLAINT**

16 In his complaint, Plaintiff sues multiple defendants for events that took place while
17 he was incarcerated by the NDOC. (ECF No. 1-1 at 1). He sues the Nevada Board of
18 Parole (“the Board”), the State of Nevada, Tony Corda, Susan Jackson, Adam Endel,
19 Michael Keeler, Connie Bisbee, Ed Gray, and Maurice Silva. (*Id.* at 1-4). Plaintiff alleges
20 two counts and seeks monetary damages, immediate release on parole, an order that the
21 Nevada Legislature change Nevada laws to parole inmates at the bottom of their
22 sentencing ranges, and a declaration that Nevada’s parole laws are unconstitutional. (*Id.*
23 at 6, 10).

24 **A. Count I**

25 Count I alleges the following: The Board of Parole’s reliance on immutable
26 characteristics, such as the seriousness of the offense, to deny parole violates due
27 process. (ECF No. 1-1 at 5). The Board failed to follow its own internal guidelines when
28 assessing applicable aggravating and mitigating factors. (*Id.* at 6.) The Board relied on

1 three reasons relating to Plaintiff's history of obstructing police officers to apply mitigating
2 factors. (*Id.*) Because these offenses were misdemeanor offenses, not felonies, the
3 reasons for denial of parole are "fabricated." (*Id.*) In addition, the internal guidelines state
4 that, if a person is now serving a sentence of life for murder or sexual assault, the
5 aggravating factor should not apply as the person already has committed the most serious
6 crime. (*Id.*) Based on this language, the aggravating factor should not have been applied
7 to him. (*Id.*) This is an arbitrary and capricious exercise of discretion, which is contrary
8 to the evidence and rules of law. (*Id.*) Plaintiff alleges that this violates the Fourteenth
9 Amendment's Due Process Clause. (*Id.*)

10 **1. Heck/Wilkinson Bar**

11 In *Heck v. Humphrey*, 512 U.S. 477 (1994), the Supreme Court held that "in order
12 to recover damages for [an] allegedly unconstitutional conviction or imprisonment, or for
13 other harm caused by actions whose unlawfulness would render a conviction or sentence
14 invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed
15 on direct appeal, expunged by executive order, declared invalid by a state tribunal
16 authorized to make such determination, or called into question by a federal court's
17 issuance of a writ of habeas corpus." *Id.* at 486-87. "A claim for damages bearing that
18 relationship to a conviction or sentence that has not been . . . invalidated is not cognizable
19 under § 1983." *Id.* at 487. "Thus, when a state prisoner seeks damages in a § 1983 suit,
20 the district court must consider whether a judgment in favor of the plaintiff would
21 necessarily imply the invalidity of his conviction or sentence; if it would, the complaint
22 must be dismissed unless the plaintiff can demonstrate that the conviction or sentence
23 has already been invalidated." *Id.* As a result, the Supreme Court has held that "a state
24 prisoner's § 1983 action is barred (absent prior invalidation)—no matter the relief sought
25 (damages or equitable relief), no matter the target of the prisoner's suit (state conduct
26 leading to conviction or internal prison proceedings)—if success in that action would
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1 necessarily demonstrate the invalidity of confinement or its duration. *Wilkinson v. Dotson*,
2 544 U.S. 74, 81-82 (2005) (emphasis added).

3 In Nevada, the parole consideration process generally begins with an initial
4 assessment of whether to grant or deny a prisoner parole. The initial assessment is
5 based on the prisoner's assigned risk level and the severity level of the crime for which
6 parole is being considered. NAC § 213.516. As part of the initial assessment, the Parole
7 Board sometimes takes into account aggravating and mitigating factors, such as whether
8 the prisoner has committed increasingly serious crimes. *Id.*; NAC § 213.518. After
9 establishing an initial assessment, the Board may consider aggravating and mitigating
10 factors to determine whether to grant parole.² NAC § 213.518. However, the Board is
11 free to deviate from the standards contained in NAC § 213.516 and NAC § 213.518, and
12 the Board may deny parole even when the standards in these provisions indicate that
13 parole should be granted. See NAC § 213.560.

14 Under Nevada law, when the Board is determining whether an aggravating factor
15 in NAC § 213.518 applies, the Board is not to rely on a layperson's definition and
16 understanding of the factor, but must instead correctly apply the Division of Parole and
17 Probation guidelines as set forth in the *Nevada Parole Guidelines Aggravating and*
18 *Mitigating Factors Definitions*. See *Anselmo v. Bisbee*, 396 P.3d 848, 852 (2017) (holding
19 that aggravating factor of increasingly serious criminal history did not apply regardless of
20 whether seriousness of prisoner's criminal history had increased because definition in the
21 guidelines stated that the factor did not apply to person serving life sentence for murder).

22 Plaintiff appears to be challenging whether the Board correctly assessed certain
23 aggravating factors. Even if a court were to find that the Board erred in its determination
24 of how particular aggravating factors applied to Plaintiff under its internal guidelines, such
25 errors would not necessarily imply the invalidity of the denial of parole; the Board might
26 deny parole even if the factors were assessed correctly in accordance with the guidelines.

27 ² In addition to specific factors identified in the administrative code, the Parole Board may consider "[a]ny
28 other factor which indicates an increased risk that the release of the prisoner on parole would be dangerous
to society or the prisoner." NAC § 213.518(2)(a), (o).

1 Furthermore, the potential relief would not be to order Plaintiff's release, but instead would
2 be for the Board to correctly decide how the internal guidelines apply to the particular
3 aggravating factors and hold another parole hearing to determine whether or not to grant
4 parole. *Cf. Anselmo v. Bisbee*, 396 P.3d 848, 852 (2017). Therefore, *Heck* and *Wilkinson*
5 do not bar Plaintiff's due process claim to the extent that the claim is based on Plaintiff's
6 allegations that the Board incorrectly applied its internal guidelines regarding aggravating
7 factors.

8 However, to the extent Plaintiff is alleging that the Board violated his due process
9 rights by wrongly *denying him parole* based on certain facts, including immutable
10 characteristics such as the seriousness of the offense, the claim is barred because it
11 necessarily challenges the duration of Plaintiff's confinement.³

12 **2. Due Process Claim**

13 An error of state law is not a denial of due process. *Swarthout v. Cooke*, 562 U.S.
14 216, 222 (2011). Thus, a plaintiff may not transform a state-law issue into a federal one
15 merely by asserting a violation of due process. *Langford v. Day*, 110 F.3d 1380, 1389 (9th
16 Cir. 1996). Therefore, to the extent Plaintiff alleges that his due process rights were
17 violated merely because the Board misapplied the guidelines, he fails to state a colorable
18 due process claim and cannot do so.⁴ *Cf. Anselmo v. Bisbee*, 396 P.3d 848, 852 (2017)
19 (holding that the Board's misapplication of an aggravating factor during the initial
20 assessment violated the prisoner's state statutory rights, but was not a due process
21 violation).

22 Standard due process analysis requires a plaintiff to prove that he has a liberty
23 interest or property interest and that the defendant deprived the plaintiff of that interest

24 ³ In addition, for the reasons discussed in Section II.A.2, even if *Heck* and *Wilkinson* did not bar this portion
25 of the due process claim, Plaintiff could not state a due process claim based on this theory because Plaintiff
26 does not have a liberty interest and because the failure to comply with state law does not constitute a
violation of due process. Therefore, the Court will dismiss this claim with prejudice, as amendment would
be futile.

27 ⁴ Section 1983 does not provide a cause of action for violations of state law. *See Galen v. County of Los*
28 *Angeles*, 477 F.3d 652, 662 (9th Cir. 2007). If Plaintiff wishes to pursue claims for alleged violations of
state law, he should pursue such claims in state court. *See, e.g., Anselmo v. Bisbee*, 396 P.3d 848 (2017).
The Court expresses no opinions regarding the merits of any state law claims.

1 without the constitutionally required procedural protections. *Swarthout*, 562 U.S. at 219.
2 A state may create a liberty interest in parole, which would then be subject to certain
3 constitutionally mandated procedural requirements, but the mere presence of a parole
4 system in a state does not give rise to a constitutionally protected liberty interest in
5 parole. *Bd. of Pardons v. Allen*, 482 U.S. 369, 373 (1987); *Moor v. Palmer*, 603 F.3d 658,
6 661 (9th Cir. 2010). A state creates a liberty interest in parole only when its statutory
7 parole provisions use mandatory language creating a presumption that parole release will
8 be granted and limiting the parole board's discretion. *Allen*, 482 U.S. at 373-81. Nevada's
9 statutory parole scheme, which applies to Plaintiff in the instant case, does not use
10 mandatory language and hence does not create a constitutionally cognizable liberty
11 interest in parole for Plaintiff. *Moor*, 603 F.3d at 661-62. Without a cognizable liberty
12 interest in parole, a prisoner cannot state a due process claim. *Moor*, 603 F.3d at 662.

13 The Court finds that Plaintiff does not have a liberty interest in parole and therefore
14 does not and cannot state a due process claim. Accordingly, the Court dismisses the due
15 process claims with prejudice, as amendment would be futile.

16 **B. Count II**

17 Count II alleges the following: A class of inmates has been created by denying
18 inmates parole at the bottom number of their sentence in order to drive and fund Nevada's
19 conviction for profit legal system. (ECF No. 1-1 at 6). California and half the other states
20 in the country guarantee parole at the "bottom number of the sentence." (*Id.*) In such
21 situations, this provides a liberty interest sufficient to invoke the Due Process Clause.
22 (*Id.*) However, Plaintiff's minimum sentence is ten years and he already had served ten
23 years in prison when the Board denied him parole. (*Id.* at 4.) Plaintiff's lack of a liberty
24 interest leads to a "(5) year dump," causing inmates to do more time than the statute
25 intended. (*Id.* at 6). Plaintiff alleges that this violates the Equal Protection Clause of the
26 Fourteenth Amendment and the Constitution's Ex Post Facto Clause. (*Id.*)

1 The Court finds that Plaintiff's claims are barred by *Heck* and *Wilkinson*. Plaintiff
2 alleges that he was required to serve more time than was constitutionally permissible and
3 that he was entitled to be released when he served his minimum term of ten years, but
4 was not released at that time. According to the Complaint, Plaintiff is currently still
5 imprisoned and he seeks an order for his immediate release. (*Id.* at 1, 10). Because
6 Plaintiff has not shown that another court has invalidated the duration of his confinement,
7 his equal protection and ex post facto claims are barred by *Heck* and *Wilkinson*. The
8 Court therefore dismisses these claims without prejudice and without leave to amend.

9 **III. CONCLUSION**

10 For the foregoing reasons, it is ordered that the Clerk of the Court will file the
11 complaint (ECF No. 1-1) and will send Plaintiff a courtesy copy of the complaint.

12 It is further ordered that Count I is dismissed with prejudice as amendment would
13 be futile.

14 It is further ordered that Count II is dismissed without prejudice and without leave
15 to amend.

16 It is further ordered that the application for leave to proceed *in forma pauperis* (ECF
17 No. 1) is denied as moot.

18 It is further ordered that the Clerk of the Court shall enter judgment accordingly
19 and close this case.

20 DATED THIS 5 day of June 2019.

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23 GLORIA M. NAVARRO, CHIEF JUDGE
24 UNITED STATES DISTRICT JUDGE
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